BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHIRLEY TREASTER	)	
Claimant	)	
VS.	)	
	)	Docket No. 205,065
DILLON COMPANIES, INC.	)	
Respondent	)	
Self-Insured	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

All parties requested review of the Award dated August 29, 1996, entered by Administrative Law Judge Bruce E. Moore. The Appeals Board heard oral argument on January 30, 1997.

APPEARANCES

Andrew L. Oswald of Hutchinson, Kansas, appeared for the claimant. Scott J. Mann of Hutchinson, Kansas, appeared for the respondent. David G. Shriver of McPherson, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the record includes, and the Appeals Board has considered, the parties' stipulations filed with the Division of Workers Compensation on April 29, 1996, May 2, 1996, October 15, 1996, and November 6, 1996.

ISSUES

The Administrative Law Judge found the appropriate date of accident for computation of benefits to be August 2, 1993, and an average weekly wage of $543.86 without additional compensation items and, when considering fringe benefits, an average weekly wage which would qualify for the maximum weekly permanent partial disability benefit of $313.

For the period from August 3, 1993, to May 28, 1994, the Administrative Law Judge found a 1 percent permanent partial general disability. For the period from May 28, 1994, to January 1, 1995, the Administrative Law Judge found a 50 percent permanent partial general disability. And, finally, for the period commencing January 1, 1995, the Judge found a 100 percent permanent partial general disability and determined that respondent could offset the permanent partial general disability benefit by claimant's retirement pension. The Administrative Law Judge also found the respondent and the Workers Compensation Fund were equally liable for the costs and benefits associated with this claim.

The parties have asked the Appeals Board to review the following issues:

(1) What is the appropriate date of accident?

(2) What is claimant's average weekly wage?

(3) What is the nature and extent of claimant's injury and disability?

(4) Is the respondent entitled to an offset for retirement benefits as provided by K.S.A. 44-501(h)?

(5) What is the liability, if any, of the Workers Compensation Fund?

(6) Is claimant entitled to an award for underpayment of temporary total disability benefits?

(7) Did the Administrative Law Judge properly compute claimant's award?

(8) Is K.S.A. 44-501(h) constitutional?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

(1) Claimant began working for the respondent in the shipping division of the bakery department in 1968. In 1990, claimant began experiencing problems with her left foot. From early 1990 through May of 1991, claimant treated with various doctors including, among others, a chiropractor, a podiatrist, and orthopedic specialists. Claimant next sought medical treatment in May 1993 from Bradley W. Bruner, M.D. By that time, claimant was experiencing symptoms in both feet.

(2) Claimant sustained personal injury to her feet as a result of working for the respondent. The accidental injury arose out of and in the course of claimant's employment with respondent.

(3) As a result of the bilateral foot injury which has been diagnosed as an overuse syndrome, claimant has a 1 percent whole body functional impairment. Due to the bilateral foot injury, claimant is now limited to standing and walking a maximum of one to two hours per day.

(4) Claimant was off work from January 6 to April 5, 1993, for problems with her right upper extremity which were unrelated to the bilateral foot injury. Claimant returned to work on April 5, 1993, with restrictions that she only work four hours per day due to the right arm. After returning to work, claimant experienced additional foot pain and sought medical treatment from Dr. Bruner whom she first saw on May 10, 1993.

(5) Dr. Bruner immediately prescribed arch supports for claimant's shoes. However, he permitted claimant to continue working the four-hour schedule she was then observing. Based upon claimant's testimony, the arch supports did not help.

(6) In June 1993, because claimant's right upper extremity problems had somewhat resolved, claimant was released to return to work on a full-time basis. After working one eight-hour day, claimant's bilateral foot symptoms increased to the point she returned to Dr. Bruner for additional treatment. Immediately, the doctor restricted claimant's work to four hours per day.

(7) Dr. Bruner referred claimant to Steven J. Howell, M.D., an orthopedic surgeon who specializes in foot and ankle surgery. By letter to Dr. Howell dated July 9, 1993, Dr. Bruner advised Dr. Howell the soft orthotics he had earlier prescribed had not worked. Claimant first saw Dr. Howell on August 3, 1993, and the doctor casted both of claimant's feet and released her to return to work.

(8) Respondent initially would not permit claimant to return to work with her casts. Therefore, claimant was off work from August 3, 1993, until November 22, 1993, when respondent gave claimant an accommodated job which permitted her to sit. Claimant performed the accommodated work until May 28, 1994, when respondent could no longer provide appropriate work.

(9) Claimant sustained repetitive micro-traumas to her feet while working for the respondent through August 3, 1993. The treatment prescribed by Dr. Bruner did not relieve claimant's symptoms. Claimant performed her regular job duties through that date and it is, therefore, reasonable to conclude that claimant's feet continued to sustain injury while performing that work. As Dr. Bruner's July 9, 1993, letter to Dr. Howell indicated, the soft orthotics which Dr. Bruner had prescribed did not help relieve claimant's condition. After August 3, 1993, claimant did not sustain additional injury to her feet because she was wearing either casts or braces or sitting while at work.

(10) Claimant served written claim upon the respondent for workers compensation benefits for her bilateral foot problems on May 11, 1993.

(11) After leaving respondent's employment on May 28, 1994, claimant has neither worked nor sought any employment.

(12) The parties stipulated that commencing August 1, 1994, claimant began receiving $1250 per month in retirement benefits. Respondent made all of the contributions to the retirement plan.

(13) The parties stipulated to claimant's average weekly wage for two dates of alleged accident, May 10, 1993, and May 20, 1994. However, because the Appeals Board has found the appropriate date of accident for the period of injury in question to be August 3, 1993, the parties' wage stipulations cannot be utilized. The Appeals Board finds claimant's base wage was $461.20 ($11.53 per hour x 40 hours per week). Pursuant to the parties' wage stipulation filed October 15, 1996, respondent continued to pay claimant's insurance and pension benefits until January 1, 1995. Claimant then began to pay her own insurance premiums. Therefore, commencing January 1, 1995, claimant's average weekly wage includes $97.27 per week for insurance benefits which qualifies claimant for the maximum weekly benefits for a post-July 1,1993, accident.

(14) As a result of the bilateral foot injury, claimant is no longer able to stand or walk more than one or two hours per day. Based upon the uncontroverted and persuasive testimony of board-certified physical medicine and rehabilitation physician, Philip R. Mills, M.D., the Appeals Board finds claimant has lost the ability to perform all of the job tasks which she performed in the 15-year period preceding the bilateral foot injury.

(15) For the period that claimant worked for respondent between August 3, 1993, and May 28, 1994, claimant earned a comparable wage to what she was earning before her injury. Claimant has not worked after May 28, 1994, but began receiving early retirement benefits as of August 1, 1994. Therefore, for the period after May 28, 1994, the difference between claimant's pre- and post-injury average weekly wage is 100 percent.

(16) Claimant has not made a good faith attempt to find appropriate employment following her termination with respondent. As indicated by Dr. Howell, claimant has a chronic pain condition in her feet but it would not give her problems if she had sedentary work. Also, as indicated by labor market expert Jerry Hardin, claimant retains the ability to perform work in the open labor market. Based upon Mr. Hardin's opinion, the Appeals Board finds claimant retains the ability to earn $240 per week despite her injuries.

CONCLUSIONS OF LAW

(1) Claimant sustained injury to her feet over a period of time due to repetitive micro-traumas. For computation purposes the appropriate date of accident for that period of accidental injury is August 3, 1993. The Appeals Board agrees with the Administrative Law

Judge that August 1993 is the most logical and the best supported by both claimant's work history and the medical evidence.

From January 6 through April 4, 1993, claimant was off work for treatment to her right upper extremity. When she returned to work on April 5, 1993, because of her upper extremity injury claimant worked only four hours per day. Despite her one-half work day, claimant's bilateral foot symptoms increased to the extent she sought medical treatment from Dr. Bruner, the first such treatment she had sought since 1991. Claimant also indicated she believed her right foot problems began shortly before she first saw Dr. Bruner which indicates claimant's condition was worsening despite only working one-half days. When claimant attempted to work an eight-hour day in June 1993, her symptoms increased and claimant returned to Dr. Bruner who immediately restricted claimant's work day to four hours because of her bilateral foot problems.

Claimant continued to work four hours per day performing her regular duties until she saw Dr. Howell on August 3, 1993. Dr. Howell casted claimant's feet and released her to return to work. Once casted, claimant did not sustain additional micro-traumas to her feet. However, because she was in casts, respondent did not initially permit claimant to work. Claimant remained off work until November 22, 1993, when respondent provided her with an accommodated job which she could perform while sitting. Claimant performed the accommodated job until May 28, 1994.

The Appeals Board finds August 3, 1993, was the last day claimant performed her regular job duties and, therefore, was the last day claimant sustained the repetitive micro-traumas to her feet. Therefore, it should be considered as the date of accident for computation purposes for the period of accidental injury in question. That conclusion is also supported by Dr. Howell who testified as follows:

> A. I think so. You know, there was no one specific time that Shirley had no pain and then suddenly fell and had a foot crushed and that caused the pain. It was a slowly increasing problem that had been going on. And I should mention it started, according to Shirley's history, in approximately 1987, and depending on how much time she is on her feet and the activities depended on how severe her symptoms were. And so, obviously, if there's no one incident, it's a slowly accumulating injury that is --
>
> Q. And I guess to take it one step further, she advised you that she associated it with her job of being on her feet all day climbing up stacks of food products, correct?
>
> A. Yes.
>
> Q. And from a general sense, as long as she's performing that job, whether that be four hours out of a day or eight hours a day, that's the activity that was causing injury to her feet, correct?

A. Correct.

> MR. OSWALD: Objection. It causes him to assume she would have been on her feet the entire four hours, and there was time she was accommodated where she would not have been on her feet for four hours.

Q. (By Mr. Mann) Assume with me that I'm talking about when she was working four hours a day performing the job as you described it, climbing up stacks and being on a concrete floor four hours out of the day.

A. I can say this much, when a person presents with Shirley's clinical drawing on the form, her history and her physical exam, it tells me she's having overuse pain in her feet, that basically she's hurting her feet an iota more than her foot can heal itself in a typical day. That activity that's causing that is essentially everything that she does on her feet, but certainly the activity of climbing up the racks, as she described it, does tend to stress one's arch substantially. And I think it's somewhat speculative to say that activity alone did it, but her activity was more than her feet could tolerate in a particular day with the amount of foot support she was in at that time.

The work activity which caused the micro-traumas and permanent injury to claimant's feet continued through August 3, 1993, and then ceased. Considering the entire record, August 3, 1993, is the most appropriate date of accident for purposes of computation of this award under the guidelines set forth in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), and Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995).

(2) Claimant provided respondent with timely written claim for workers compensation benefits. The written claim statute, K.S.A. 44-520a, provides in part:

> (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

Claimant served written claim upon respondent in May 1993 for the symptoms she was experiencing in her feet. The injury sustained through August 3, 1993, is part and parcel

of the ongoing injury process for which written claim was made. Therefore, the May 1993 claim satisfies the provisions of K.S.A. 44-520a.

(3) Because hers is an "unscheduled" injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 44-510e which provides in pertinent part as follows:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Claimant is entitled to temporary total disability benefits for the period from August 3 through November 21, 1993. For the remainder of the period between August 3, 1993, and the claimant's last day of work on May 28, 1994, claimant is entitled to benefits for a 1 percent permanent partial general disability. During that period respondent provided claimant with accommodated employment which paid a wage comparable to what she was earning on the date of accident. Therefore, K.S.A. 44-510e limits the permanent partial disability benefits payable for the period before May 28, 1994, to the functional impairment rating.

For the period following claimant's last day of work on May 28, 1994, claimant is entitled to permanent partial disability benefits based upon a work disability. Following that date claimant no longer earned 90 percent or more of her pre-injury average weekly wage. K.S.A. 44-510e indicates the fact finder is to average the task loss percentage with the difference in actual pre- and post-injury wages. However, before a 100 percent wage difference can be utilized in the disability formula, a worker must establish he or she has made a good faith effort to find appropriate employment or a wage will be imputed for purposes of the wage loss prong. *See* Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

The Appeals Board finds claimant has not made a good faith effort to find work within her permanent restrictions and limitations. As indicated above, claimant retains the ability to earn $240 per week. When comparing $240 to claimant's pre-injury wage of $635.67, the Appeals Board finds claimant has a wage loss of 62 percent for purposes of the permanent partial general disability computation.

K.S.A. 44-510e requires the Appeals Board to average the 100 percent task loss with the 62 percent wage loss which creates an 81 percent permanent partial general disability for the period commencing May 29, 1994.

(4) Because claimant's accidental injury occurred after July 1, 1993, respondent is entitled to reduce claimant's permanent partial general disability benefits by the $1250 per month in retirement benefits when they began on August 1, 1994. As indicated above, respondent made all the contributions to the retirement plan. The weekly offset amount is $288.46. *See* K.S.A. 44-501(h) which provides in pertinent part as follows:

> If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

Therefore, for the period commencing August 1, 1994, claimant's permanent partial disability benefit is reduced by $288.46 per week.

(5) For the reasons set forth by the Administrative Law Judge, the Workers Compensation Fund is responsible for 50 percent of the costs and benefits associated with this claim.

(6) Because of the determination of the date of accident, there exists an underpayment of benefits which is corrected by the Award below.

(7) The Appeals Board has corrected the computation of benefits in the Award below. The computation method utilized in this proceeding is the same as that found reasonable in Bohanan v. U.S.D. 260, 24 Kan. App. 2d 362, __ P.2d __ (1997).

(8) The Appeals Board does not have the authority to strike down a statute for being unconstitutional. Therefore, the Appeals Board will not address claimant's constitutional arguments regarding K.S.A. 44-501(h). However, the Kansas Supreme Court found that statute constitutional in Injured Workers of Kansas v. Franklin, 262 Kan. 840, 942 P.2d 591 (1997).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated August 29, 1996, entered by Administrative Law Judge Bruce E. Moore should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Shirley Treaster, and against the respondent, Dillon Companies, Inc., a qualified self-insured, and the Workers Compensation Fund, for an accidental injury which occurred for computation purposes on August 3, 1993, and based upon an average weekly wage of $461.20 for 15.86 weeks of temporary total disability compensation at the rate of $307.48 per week or $4,876.63, followed by 4.14 weeks at the rate of $307.48 per week, or $1,272.97, for a 1% permanent partial general body disability for the period August 3, 1993, through May 28, 1994.

For the period May 29, 1994, through July 31, 1994, claimant is entitled to 9.14 weeks of permanent partial disability benefits at the rate of $307.48 per week, or $2,810.37 for an 81% work disability without reduction for payment of retirement benefits. For the period from August 1, 1994, through December 31, 1994, claimant is entitled to 21.86 weeks of permanent partial disability benefits at the weekly rate of $19.02 ($307.48 - $288.46), or $415.78. For the period commencing January 1, 1995, claimant is entitled to 300.31 weeks of permanent partial general disability benefits at the weekly rate of $24.54 ($313 - 288.46), or $7,369.61, for a total award of $16,745.36.

As of January 20, 1998, there is due and owing claimant 15.86 weeks of temporary total disability benefits at the rate of $307.48 per week, or $4,876.63, followed by 4.14 weeks of permanent partial general disability benefits at the rate of $307.48 per week, or $1,272.97, followed by 9.14 weeks of permanent partial general disability benefits at the rate of $307.48 per week, or $2,810.37, followed by 21.86 weeks of permanent partial general disability benefits at the rate of $19.02 per week, or $415.78, followed by 182 weeks of permanent partial general disability benefits at the rate of $24.54 per week or $4,466.28, for a total due and owing of $13,842.03, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $2,903.33 is to be paid for 118.31 weeks at the rate of $24.54 per week, until fully paid or further order of the Director.

The Appeals Board hereby adopts the remaining orders set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew L. Oswald, Hutchinson, KS
Scott J. Mann, Hutchinson, KS
David G. Shriver, McPherson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director